



COMMITTEE OF EXPERTS

ON CONSTITUTIONAL REVIEW

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INVITATION FOR PROPOSALS ON CONTENTIOUS ISSUES

In accordance with section 23(b) and 30(1)(b) of the Constitution of Kenya Review Act 2008, the Committee of Experts on Constitutional Review is mandated to identify the issues which are contentious or not agreed upon in the Constitutional Review Process. In doing so, the Committee has -

- a) Studied all existing draft constitutions (Constitution of Kenya Review Commission draft (2002), Draft Constitution of Kenya (2004) (Bomas draft), and Proposed New Constitution of Kenya (2005)) as required by section 29(b) and (c) of the Review Act;
- b) Consulted on the summary of the views of Kenyans collected and collated by the Constitution of Kenya Review Commission (CKRC) as required by section 29(a) of the Review Act;
- c) Examined documents reflecting political agreement on critical constitutional questions, such as the Naivasha Accord, as required by section 29(d) of the Review Act;
- d) Considered analytical and academic studies commissioned or undertaken by the CKRC and the National Constitutional Conference and later reports including the IREC (Kriegler Commission) (2008) and CIPEV (Waki Commission) (2008) reports, as required by sections 29(e) and 30(1) of the Review Act; and
- e) Studied the memoranda submitted to the Committee of Experts on what issues the public considers to be contentious.

Having carefully debated and discussed these documents, the Committee has unanimously identified the following as issues that are **contentious and not agreed** upon:

- a) **The Executive and Legislature**
- b) **Devolution of powers**
- c) **Bringing the constitution into effect (transitional clauses).**

1. **The Executive and Legislature**

1.1 With reference to the legislature and executive, there is consensus that:

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- a) Executive and legislative authority in Kenya must be exercised for the benefit of the people and communities in Kenya and must serve the people.
- b) A person exercising executive authority must not act in a manner incompatible with the principle of service to the people.
- c) Executive and legislative power should be exercised within clear limits and subject to proper checks and balances.

1.3 The issues which are contentious or not agreed upon are:

1.4

- i. What should the relationship between Parliament and the Executive be – should there be a **Presidential system**, with a President and Cabinet who are not Members of Parliament? In a presidential system, the President is directly elected by the people and is Head of State and Head of Government, with a Vice President as running mate.
- ii. Should there be a **Parliamentary System** with the Prime Minister as head of the Executive (Government), chosen from Parliament? In a parliamentary system, the power to govern derives from Parliament and the Prime Minister is appointed from a political party or coalition of parties that has the majority of seats in Parliament. The Prime Minister usually appoints the Cabinet from within Parliament. There may be a ceremonial President as a representative Head of State.
- iii. Should there be a **'mixed'** or **'hybrid'** system with a President and Prime Minister sharing power? How should this power be shared? Such 'mixed' or hybrid systems vary on the extent to which executive power is shared between the President and the Prime Minister.
- iv. Whatever system is chosen, what are the best ways of ensuring that:
 - o All Kenyan people and communities are properly represented and served?
 - o The executive is properly accountable?

1.3 With specific reference to the legislature, the issues which are contentious or not agreed upon are:

- i. What should the name and role of a Second House be?
- ii. What should be the powers of such a House be in relation both to the other House and to the Executive?

2. Devolution of powers

2.1 With reference to devolution of powers, there is consensus that:

- a) A new Constitution for Kenya should not provide for a system whereby powers of government are concentrated in a central government.
- b) Powers of government must be shared between a central government and one or more devolved levels of government.
- c) Devolved governments should be democratic and participatory.

2.2 The issues which are contentious or not agreed upon are:

- i. Should there be only two or more levels of government?
- ii. What should the powers of each level of government be?
- iii. How much power to supervise devolved governments and ensure equity across the country should be vested in the central government?

3 Bringing the Constitution into effect (transitional issues)

3.1 With respect to bringing the new constitution into effect, there is consensus that:

- a) A new Constitution should create a fresh start for Kenya establishing the rule of law, protection of human rights, and respect for everyone irrespective of their gender, ethnicity, disability, age, religion, culture or political persuasion.
- b) The institutions and office bearers in the new Constitution must have the confidence of the people and be accountable to them.
- c) All government action and every exercise of power should be based on the new Constitution.

3.2 The issues which are contentious or not agreed upon are:

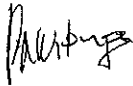
- i. How should the adoption and coming into force of the new Constitution affect holders of political constitutional positions or offices, such as the President, Vice-President, Prime Minister, Deputy Prime Ministers, Cabinet, and Members of Parliament? Should these office holders complete their terms?

- ii. How should the adoption and coming into force of the new Constitution affect holders of unelected constitutional positions or offices, such as the Auditor-General, the Attorney-General, and Judges?
- iii. A new Constitution will require many new laws. What measures can be put in place to ensure that Parliament will pass these laws?

In accordance with the Act and, specifically, section 23(c), the Committee of Experts invites the public to submit memoranda on the contentious issues listed to:

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Signed:



Nzamba Kitonga
Chairperson, Committee of Experts